



## DEPARTMENT OF TRANSPORTATION

### Federal Railroad Administration

#### 49 CFR Part 243

[Docket No. FRA-2020-0017, Notice No. 1]

RIN 2130-AC87

### Training, Qualification, and Oversight for Safety-Related Railroad Employees

**AGENCY:** Federal Railroad Administration (FRA), Department of Transportation (DOT).

**ACTION:** Notice of proposed rulemaking (NPRM).

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**SUMMARY:** In response to petitions for rulemaking, FRA proposes amending its regulation on Training, Qualification, and Oversight for Safety-Related Railroad Employees (Training Rule) to codify agency guidance and clarify existing requirements.

**DATES:** Written comments on the proposed rule must be received by [INSERT DATE 60 DAYS AFTER DATE OF PUBLICATION IN THE FEDERAL REGISTER].

FRA will consider comments received after that date to the extent practicable.

**ADDRESSES:** *Comments:* Comments related to Docket No. FRA-2020-0017 may be submitted by going to <https://www.regulations.gov> and following the online instructions for submitting comments.

*Instructions:* All submissions must include the agency name, docket number (FRA-2020-0017), and Regulatory Identification Number (RIN) for this rulemaking (2130-AC87). All comments received will be posted without change to <https://www.regulations.gov>; this includes any personal information. Please see the Privacy Act Statement heading in Section IV of this document for Privacy Act information related to any submitted comments or materials.

*Docket:* For access to the docket to read background documents or comments received, go to <https://www.regulations.gov> and follow the online instructions for accessing the docket.

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## **I. Executive Summary**

### *Purpose of the Regulatory Action and Legal Authority*

In response to the mandate of section 401(a) of the Rail Safety Improvement Act of 2008 (RSIA),<sup>1</sup> on November 7, 2014, FRA published a final rule (2014 Final Rule) establishing minimum training standards for safety-related railroad employees and requiring railroad carriers, contractors, and subcontractors to develop and submit certain training programs to FRA for approval.<sup>2</sup>

On May 3, 2017, FRA published a final rule which delayed implementation dates in the 2014 Final Rule by one year.<sup>3</sup> The delay was necessary to help model training program developers and other regulated entities comply with the rule.<sup>4</sup> On April 27, 2018, FRA published a final rule in response to a petition for reconsideration of that May 2017 rule by granting the American Short Line and Regional Railroad Association's (ASLRRA) request to delay the implementation dates by an additional year.<sup>5</sup> FRA determined that the delay was necessary to improve compliance, reduce significant cost impacts associated with the rule, and prevent complicating the approval process.<sup>6</sup>

On June 27 and July 31, 2019, FRA received joint petitions for rulemaking filed by ASLRRA and the National Railroad Construction and Maintenance Association, Inc. (NRC) (collectively, "Associations") requesting additional implementation delays and other changes to the 2014 Final Rule; these petitions were docketed in DOT's Docket

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<sup>1</sup> Pub. L. 110-432, 122 Stat. 4883 (Oct. 16, 2008), codified at 49 U.S.C. 20162. The Secretary of Transportation delegated the authority to carry out this mandate to the the Federal Railroad Administrator. 49 CFR 1.89(b).

<sup>2</sup> 79 FR 66459.

<sup>3</sup> 82 FR 20549.

<sup>4</sup> 82 FR 20550. In December 2016, FRA completed sharing training documents FRA uses to train the agency's personnel on Federal rail safety requirements with model program developers and made those documents available on FRA's website. However, even after FRA produced those documents and performed significant outreach to educate the regulated community, one association (considered a major model program developer) informed FRA it found certain aspects of the rule confusing to implement and difficult for contractors to apply in practice.

<sup>5</sup> 83 FR 18455.

<sup>6</sup> 83 FR 18456.

Management System as FRA-2019-0050. On January 2, 2020, FRA responded to the Associations' petitions for rulemaking by issuing a final rule delaying the regulation's implementation dates for all contractors, and those Class II and III railroads that are not intercity or commuter passenger railroads with 400,000 total employee work hours annually or more.<sup>7</sup> Regarding the Associations' remaining requests in the petitions for rulemaking, FRA's January 2, 2020, final rule stated that FRA was considering addressing the Associations' remaining requests in a separate rulemaking.<sup>8</sup> This proposed rulemaking would address the remaining requests in the Associations' 2019 petitions for rulemaking, clarify current requirements, and remove regulatory provisions that are obsolete.

### *Costs and Benefits*

FRA has examined the proposed rulemaking and finds that any associated costs and benefits would be *de minimis*. It is expected that the railroad industry and FRA would experience several qualitative benefits, which are fully discussed in the Regulatory Impact section of this proposed rule. These benefits include: (1) providing clarity to the regulated community, thereby facilitating compliance with the regulatory requirements; (2) making it easier for FRA to administer the Training Rule's requirements; and (3) removing certain regulatory provisions that are obsolete.

## **II. Background**

In the 2014 Final Rule, FRA stated its intention to issue a compliance guide with a primary emphasis on assisting small entities, but which could also be used by any

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<sup>7</sup> 85 FR 10 (Jan. 2, 2020).

<sup>8</sup> 85 FR 10 (stating FRA's intent to initiate a separate rulemaking which would be limited to amending FRA's training regulation so that the regulatory text includes the latest guidance intended to help small entities and other users of model programs). FRA's response to address the Associations' remaining requests in a separate rulemaking was consistent with its previous statement on the subject. 84 FR 64447, 64449 (Nov. 22, 2019).

employer.<sup>9</sup> FRA anticipated that the compliance guide would also help model program developers in drafting programs to be adopted by small railroads and contractors. FRA issued an interim compliance guide and made it available for immediate effectiveness in the 2014 Final Rule docket<sup>10</sup> on April 21, 2015, but provided a comment period in anticipation that the regulated community might have additional comments or concerns.

On May 25, 2016, FRA responded to the comments and posted its first version of the final compliance guide.<sup>11</sup> On November 30, 2016, FRA posted a second version of the final compliance guide,<sup>12</sup> largely to publish FRA's answers to questions received from the regulated community that broad dissemination would benefit. When FRA amended the implementation dates by final rules published on May 3, 2017, and April 27, 2018, FRA made conforming changes to the final compliance guide and posted the revised version on FRA's website at <https://railroads.dot.gov/divisions/safety-partnerships/training-standards-rule>. The same location on FRA's website contains the following additional guidance: (1) an ASLRRA Q&A Document, which contains FRA's answers to 11 questions concerning part 243 posed by ASLRRA; (2) an On the Job Training (OJT) matrix, which shows the minimum type of training (i.e., formal training, OJT training, or briefing only) that FRA expects to see in a program covering each specific rail safety requirement under most circumstances; (3) OJT templates that serve as examples of OJT training standards for some types of employees; and (4) various resource documents to assist employers with training in the areas of equipment maintenance, passenger equipment requirements, brake systems, engineering and track maintenance, and signal and train control requirements.

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<sup>9</sup> 79 FR 66474.

<sup>10</sup> Document number FRA-2009-0033-0031.

<sup>11</sup> Document number FRA-2009-0033-0035.

<sup>12</sup> Document number FRA-2009-0033-0036.

This NPRM proposes addressing two of the Associations’ overarching concerns: first, that FRA provide sufficient certainty as to how the agency will apply the requirements of part 243 in the future by converting existing guidance applicable to part 243 into regulatory text; second, that FRA adopt specific regulatory text changes so as to facilitate compliance with the Training Rule.<sup>13</sup> In this Background section, FRA details the petition requests made by the Associations that FRA proposes to address and those it does not. Additionally, this Background section provides a summary of other guidance FRA has provided to the regulated community that is not addressed by the petitions for rulemaking.

**A. Petition Requests FRA Proposes Adopting**

Through their petitions for rulemaking and informal discussions with FRA, the Associations requested that FRA amend part 243 to codify the guidance, thereby providing certainty to the regulated community as to how the agency will apply part 243’s requirements in the future. In making this request, the Associations express concern that agency guidance is subject to change without rulemaking. To the extent possible, the Associations ask that FRA convert the information in guidance documents into regulatory text so that the regulated community only needs to consult the regulatory requirements to understand the part 243 regulation. FRA agrees with this request and intends this proposed rule to convert the guidance into regulatory text, to the extent possible.

*Definition of Refresher Training*

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<sup>13</sup> FRA notes that representatives of the Associations met with FRA on January 17, 2020, to discuss their requests for greater clarity pertaining to the requirements for refresher training, program submission, model program adoption, and periodic oversight. A follow-up meeting with the Associations was held by phone on December 4, 2020, so that FRA could express its continuing interest to respond to the petitions for rulemaking and the Associations could emphasize concerns of greatest interest to their members.

FRA is proposing to revise the definition of “refresher training” because the Associations’ request for clarification in their petitions for rulemaking express confusion and request clarification. FRA currently defines “refresher training” as meaning periodic retraining required by an employer for each safety-related railroad employee to remain qualified. Because refresher training is already required in other FRA regulations, albeit under different names, FRA believed the general meaning of the term was understood throughout the regulated railroad community. However, in reviewing FRA’s other refresher training requirements, and the Associations’ and other industry members’ questions about refresher training, FRA recognizes that clarifying the term would be helpful – especially for small entities.

Accordingly, FRA proposes to revise the definition of the term “refresher training” in part 243 to, among other things: (1) acknowledge that FRA refers to refresher training in its other regulations with a variety of terms (e.g., “recurrent training,” “re-training,” “periodic training,” “training that occurs periodically,” or “training that is required within defined intervals”); and (2) state that those refresher training programs or plans required by FRA’s other regulations need not be submitted to FRA for review under § 243.103(b).<sup>14</sup>

FRA’s proposed definition of refresher training explains that the purpose of this type of training is to improve the job performance of existing employees by acquainting them with any problematic issues or new skills, methods, and processes. In conjunction with the proposed revisions to the definition of “refresher training,” FRA is also proposing revisions to the refresher training requirements and options in § 243.201(e) to

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<sup>14</sup> FRA published a chart identifying those already-maintained training programs that FRA expects will not be submitted as initial or refresher training under part 243. Although FRA does not intend to maintain this chart, as FRA is perpetually removing, revising, or adding regulatory requirements, the chart published on May 1, 2019, in the compliance guide can be found at <https://railroads.dot.gov/divisions/safety-partnerships/training-standards-rule>.

clarify what employers need to include, at a minimum, to complete acceptable refresher training.

#### *Definition of Training Organizations or Learning Institutions*

FRA is proposing to add a definition of “training organizations or learning institutions” to address an issue FRA is currently answering through guidance. FRA has been asked several times whether certain small- and medium-sized businesses that provide training to employers are “training organizations or learning institutions” for purposes of part 243. Because part 243 currently lacks a definition, some businesses were confused about their need to comply with the rule. To provide clarity, and as explained in more detail in the section-by-section analysis, FRA is proposing a definition that identifies four characteristics of a training organization or learning institution.

#### *Model Program Developer or Employer with an Approved Program Wants to be Treated as a Training Organization or Learning Institution*

FRA has received inquiries from entities with FRA-approved programs (either model programs under § 243.105 or employer programs under § 243.101) asking whether they need additional FRA-approval to provide training services to employers as a training organization or learning institution. In conformance with verbal guidance that FRA has previously provided, this NPRM would clarify that such entities need not resubmit an approved model or employer program to be recognized under part 243 as a training organization or learning institution. Rather, such entities would only need to submit an informational filing for FRA-approval containing the information required § 243.111(c).

#### *Section 243.101 Employer Program Required*

FRA is proposing to revise this section to remove requirements that are obsolete and to clarify and incorporate guidance. Among other things, FRA is proposing to delete the effective date of January 1, 2020, as that implementation deadline has already passed and is now unnecessary.



In addition, this NPRM would incorporate guidance that FRA has previously provided in response to industry stakeholders' questions regarding the ability of employers to classify their safety-related railroad employees based on the FRA regulations the employees are required to comply with for their work, rather than traditional craft terminology. Specifically, this NPRM would clarify that it is permissible for an employer to classify its safety-related railroad employees by listing the Federal railroad safety laws, regulations, and orders that the employee is required to comply with to complete the employee's assignments and duties.

Further, the NPRM would incorporate FRA guidance to employers on how training is required to be structured, developed, and delivered. Specifically, OJT is required when tasks require neuromuscular coordination to learn, unless FRA approves alternative, formal training that addresses the need to practice safety-related tasks, with the ability to objectively measure task completion proficiency. Examples of alternative, formal training could include: training facilities that permit students to practice tasks that require neuromuscular coordination to learn in a controlled environment with minimal or no risk of personal injury; classroom practical exercises; role play; lab simulation; or virtual reality (VR) and other emerging technologies.

In addition, this NPRM would incorporate FRA guidance regarding contractor employers. Currently, § 243.101(e) requires a contractor that chooses to train its own safety-related railroad employees to provide each railroad that utilizes its services with a document indicating that the contractor's program of training was approved by FRA. However, the existing paragraph does not consider that some similar training programs or plans, pursuant to other regulatory requirements contained elsewhere in this chapter, are not required to be submitted in accordance with this part and, therefore, the contractor would not have a document that it could show a railroad validating FRA's approval of its program. For this reason, FRA is proposing to clarify that the requirement does not apply

when the contractor is not required to submit a training program to FRA or retain a document indicating FRA's approval of the program.

#### *Section 243.103 Training Components Identified in Program*

FRA is proposing three clarifying revisions to the requirements of § 243.103. First, existing paragraph (a)(1) requires each employer's program to include a unique name and identifier for each formal course of study. The proposed revision to this requirement clarifies that the types of formal courses needing a unique name and identifier include both initial and refresher training. An initial or refresher training course that FRA has previously approved would not need a new unique name and identifier each time it is revised.

Second, existing paragraph (a)(2)(v) requires each employer's program to include a course outline, and the outline to include the anticipated course duration. However, the existing requirement does not specify whether the anticipated course duration includes OJT. To address that gap, FRA proposes to revise the requirement to state that the employer's course outline for each course must include the anticipated course duration for all formal training combined, apart from OJT. Because OJT is rarely scheduled for a specific time duration, FRA proposes that any estimate of OJT duration be excluded from the formal training duration estimate.

Third, as discussed in the definition of Refresher Training section above, this NPRM would clarify that similar training programs or plans, currently required by other FRA regulations, do not have to be submitted to FRA under part 243. As noted in footnote 13 above, FRA has published a chart identifying those already-maintained training programs that FRA expects will not be submitted as initial or refresher training under part 243.

#### *Additional Changes to Miscellaneous Sections*

As described in the section-by-section analysis below, FRA has identified a number of additional requirements that can be eliminated as obsolete or revised to add regulatory certainty and clarity. Those changes that can be found in the proposed requirements for Training Components Identified in Program (§ 243.103), Optional Model Program Development (§ 243.105), Training Program Submission, Introductory Information Required (§ 243.107), Approval of Programs Filed by Training Organizations or Learning Institutions (§ 243.111), Records (§ 243.203), and Periodic Oversight (§ 243.205).

In addition, the Associations' petitions requested that FRA revise § 243.113 to allow any employer, not just small employers with less than 400,000 total employee work hours annually, to have the option to submit a training program by a method other than electronic submission. However, during subsequent communications, the Associations retracted that request and told FRA that they would not object to FRA proposing mandatory submission electronically for all employers through FRA's part 243 web portal. Accordingly, this NPRM proposes that change in § 243.113, Electronic and Written Program Submission Requirements.

#### **B. Petition Requests FRA Does Not Propose Adopting**

Although FRA is proposing to adopt many of the recommendations the Associations suggested in their petitions for rulemaking, there are several items that FRA is not.

FRA is not proposing any additional implementation date delays. The implementation dates in the existing rule have come due with the exception of those for implementing the refresher training requirements (December 31, 2024, for each Class I railroad and each intercity or commuter passenger railroad conducting operations subject to this part with 400,000 total employee work hours annually or more, or December 31, 2025, for each employer conducting operations subject to this part that is not covered by

the earlier implementation date). Thus, the need for implementation date delays appears to have passed or is not yet ripe for review.

Neither is FRA proposing a different set of training requirements for the Class II and III freight railroads and contractors compared to the Class I railroads. Because the work of each safety-related railroad employee must comply with the same Federal railroad safety laws, regulations, and orders, and the consequences for failing to comply with those laws can be just as dangerous regardless of the size or type of operation of the employer, it is FRA's position that safety-related railroad employees should not be held to different training standards based on the size or type of their employer. Instead, FRA's existing regulation and the proposed changes in this rulemaking provide for differences in employer size or type by allowing employers to draft their own programs or use model programs to develop training in ways that are tailored to smaller entities, or contract for training services from one or more training organizations or learning institutions.

Additionally, for the same reasons, FRA is not proposing relief for Class II and III freight railroads and contractors to have a different set of qualification requirements versus Class I railroads when an employee is qualified by an entity other than the employee's current employer and the previous qualification records are unavailable under § 243.201(d)(1).

Likewise, FRA is not proposing relief for Class II and III freight railroads and contractors to have a different refresher training period than the three-year period in the existing regulation.

FRA is also declining the Associations' suggestions to add a definition of "program" that would mean the written and electronic instructional and testing materials, and add a definition of "template" that would mean an outline of the training program, and then allow employers to submit either one. However, FRA's approach to a training program goes more to the employer describing the methodology of determining how safety-related railroad employees are to be trained and how the employer can determine

that the training is effective. Because the Associations' proposed definitions would impair that approach, FRA is declining to propose adding these two terms to the definitions section of this NPRM.

The Associations petitioned FRA to propose removing the burden on an employer to affirmatively state that it has chosen to use an FRA-approved model program, contending that the burden is unnecessary. FRA declines to propose this revision. Although the Associations acknowledge the burden is relatively small on each employer, they state that the cumulative burden on small employers is relatively large. FRA's decision to decline adopting this revision is based on the statutory requirement for the submission of "training and qualification plans to the Secretary for approval, including training programs and information deemed necessary by the Secretary to ensure that all safety-related railroad employees receive appropriate training in a timely manner."<sup>15</sup> It would be difficult for FRA to ensure that an employer's safety-related railroad employees were being trained as statutorily required without an affirmative submission from the employer. Meanwhile, FRA is proposing revisions to § 243.105(b) to help employers conceptualize the steps necessary to learn about what model programs are available and how they can obtain the model programs they need. Thus, this proposed rulemaking is targeted to easing the burden raised by the Associations in their petitions for rulemaking, even if it does not remove the burden.

The Associations' petitions suggest that FRA propose revising the records requirement in § 243.203 to eliminate the specific requirements and allow their members to keep whatever records the Class II and III railroads and contractors believe are necessary to demonstrate compliance with part 243. FRA declines to propose this

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<sup>15</sup> 49 U.S.C. 20162(a)(2).

suggestion because it would eliminate objective recordkeeping requirements in exchange for an unknown, subjective, and variable response.

The Associations' petitions suggest that FRA propose revising the periodic oversight requirements in § 243.205 to require a contractor that employs supervisory safety-related railroad employees to perform oversight only when those supervisory employees are available to perform it. FRA is not proposing this suggestion because the Associations' recommendation regarding a contractor's supervisory employees would likely render that requirement unenforceable as FRA would expect any employer could make a reasonable argument that its supervisors were too busy to perform the oversight required.

Finally, the Associations' petitions suggest that FRA propose to exclude Class II and III railroads from the requirement to conduct annual reviews. This would be an expansion of the existing exclusion which covers a railroad with less than 400,000 total employee work hours annually. FRA is not proposing this revision because the exclusion was purposely designed to exclude only the smallest Class III railroads. A railroad with at least 400,000 total employee work hours annually is large enough that it should be expected to have the resources to effectively evaluate its training programs on a regular basis. Annual reviews help ensure that a railroad is updating the program as needed and addressing rising systemic safety concerns through targeted training program changes.

### **C. Summary of FRA Guidance to the Regulated Community**

Since the effective date of the 2014 Final Rule, FRA has received questions from the regulated community regarding the agency's plans for auditing program implementation and enforcement. The following background reiterates guidance FRA provided on these subjects in response to questions received. Please note that these issues are matters of agency discretion, policy, or rules of agency organization,

procedure, or practice that are exempt from notice and comment rulemaking.<sup>16</sup>

Nevertheless, FRA will consider any comments on its procedures or practices filed in response to this proposed rule.

One question FRA answered in the compliance guide asked what an FRA audit will include. FRA understands that each employer, organization, or business required to comply with part 243 wants this information so that it can best ensure that FRA will continue to find its program, records, and activities in compliance. In the compliance guide, FRA explained that agency personnel will likely engage in the following audit activities: (1) attend classes and observe different types of training; (2) review periodic oversight records; (3) review annual review records; (4) review employee training records; (5) review training evaluation methods; and (6) confirm that each employer is complying with its training program. While FRA provided this list of standard audit activities to inform the regulated community of the general direction of most part 243 audits, the list was not intended to be exhaustive, and certainly FRA could conduct additional audit activities, including conducting interviews of relevant personnel, and conducting site visits, if applicable.

Also, in the compliance guide, FRA answered a question regarding whether the agency would provide a grace period before taking enforcement action. FRA's answer in the compliance guide reflected the agency's understanding that, as with all new regulations, it will take some time for employers to learn how to comply fully with part 243, and potentially 12 to 18 months after training program implementation for FRA to begin scheduling routine audits. Consequently, FRA's response in the compliance guide explained how FRA expects to help employers, particularly small entities, comply with part 243, albeit without a grace period. In addition, FRA clarified that it reserves the

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<sup>16</sup> 5 U.S.C. 553(b).

right to use its full enforcement authority to ensure compliance, especially in cases where gross disregard for compliance is observed.

In reviewing the guidance in the compliance guide regarding FRA enforcement, FRA adds that regulated entities should expect FRA's audits will focus on both compliance and performance. If a training program is not effective, FRA will address those performance objectives with the regulated entity. After all, the purpose of part 243 is to ensure safety-related railroad employees are properly trained and qualified so as to improve rail safety generally. To achieve that purpose, FRA expects each regulated entity to continuously look for and consider implementing industry best practices.

### **III. Section-by-Section Analysis**

#### **Subpart A – General**

##### *Section 243.1 Purpose and Scope*

Section 243.1 sets forth the purpose and scope of part 243. This NPRM proposes to add two new paragraphs, paragraphs (f) and (g), to this section to incorporate existing guidance related to railroad bridge engineers and non-railroad employees who perform elective audits or assessments.

Proposed paragraph (f) codifies guidance in the compliance guide, which explains that part 243 does not apply when the training required under FRA's regulations is obtained through earning a college degree or certification from an accredited training organization or learning institution.<sup>17</sup> For example, part 243 does not require railroad bridge engineers to receive "in-house" training when an individual qualifies as a bridge engineer under 49 CFR 237.51(b). That section provides that an individual may qualify as a bridge engineer based on a degree in engineering from an accredited school or organization. Employers are not required to provide or duplicate the same types of

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<sup>17</sup> Compliance Guide at 49-50 located at <https://railroads.dot.gov/elibrary/training-qualification-and-oversight-safety-related-railroad-employees-compliance-guide-0>.



classes a person might need to earn a college degree or certification from a college or university. However, if a railroad bridge engineer is conducting a bridge inspection as required by 49 CFR part 237, an employer is required to provide training on how to conduct a proper bridge inspection safely as required by 49 CFR part 214. Not only is it unlikely that a college engineering course would cover railroad bridge safety rules for inspections, but each railroad is likely to have its own unique combination of rules.

Proposed paragraph (g) codifies guidance in the compliance guide clarifying that employers are not required to train non-railroad employees who perform audits or assessments that are not required by Federal railroad safety laws, regulations, or orders.<sup>18</sup> FRA is proposing this change in response to the Associations' concerns specifically pertaining to employees of the Short Line Safety Institute (SLSI) who conduct safety audits and provide recommendations to short line railroads on ways to improve safety. The Associations assert in their petitions that SLSI employees are not conducting "oversight inspections or testing" and "do not train railroad employees in specific tasks." FRA agrees with the Associations' position on this issue and notes that, although the Associations suggest in their petitions that FRA amend the definition of "safety-related railroad employee" to exclude these types of non-railroad employees and SLSI employees specifically, FRA finds that the exclusion is better placed in § 243.1. FRA also finds that specifically excluding SLSI employees is unnecessary as SLSI employees clearly fall within the revised language as proposed.

#### *Section 243.3 Application and responsibility for compliance*

Section 243.3 provides that, with certain exceptions, part 243 applies to all railroads, contractors of railroads, and training organizations or learning institutions that train safety-related railroad employees. The section further makes clear that any person,

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<sup>18</sup> *Id.* at 43.

including a railroad or a contractor for a railroad, that performs any duty covered by part 243 is responsible for performing that duty in accordance with part 243. In response to industry's request that a parent or holding company be able to submit a part 243 training program on behalf of its subsidiaries, FRA has allowed parent and holding companies to submit training programs on behalf of their subsidiaries as long as the filing thoroughly describes which companies are covered by the submission and how each company is covered. The current regulation, however, is silent on this issue and FRA has not issued guidance on the issue.

To address this issue in a clearer, more transparent manner, FRA proposes adding paragraph (c) to this section to clarify how a parent or holding company may comply with the requirements of this part on behalf of one or more subsidiaries. In paragraph (c)(1), FRA proposes a requirement that the arrangement be specified and submitted as other programs are required in subpart B. Paragraph (c)(1)(i) proposes that the arrangement may be used to fulfill all or a portion of a subsidiary's responsibility for compliance required by part 243. This proposed provision is intended to allow flexibility for each subsidiary to opt out of a parent or holding company's program when the subsidiary's training needs are different.

Proposed paragraph (c)(1)(ii) would require that a parent or holding company that submits a training program on behalf of one or more subsidiaries must initially and continually maintain in its submission a list of the subsidiaries covered and the extent to which each subsidiary is adopting a parent or holding company's training program.

Recognizing that the efficiencies of a joint filing arrangement would be lost if a subsidiary were to duplicate a parent or holding company's filing on its behalf, paragraph (c)(2) proposes to prohibit a subsidiary from filing a duplicate of any training program a parent or holding company submitted on its behalf.

Proposed paragraph (c)(3) would provide that each railroad, even if it is a subsidiary of a parent or holding company, is responsible for compliance with the training program submission requirements in subpart B. A subsidiary should not presume that the parent or holding company will fulfill the program submission requirements without confirming the arrangement. FRA reserves the right to take enforcement action against each “person,” as defined in § 243.5, that fails to comply with the program submission requirements of subpart B.

Proposed paragraph (c)(4) would require that when a parent or holding company’s training program submission is filed on behalf of the parent or holding company’s subsidiaries, each subsidiary is required to comply with that training program submission unless the subsidiary files its own program with FRA. The existing and proposed requirements in part 243 are predicated on each employer submitting a training program and complying with that training program submission. This proposed requirement ensures that a subsidiary understands that it would have an obligation to comply with the parent or holding company submission unless it takes the affirmative step to file its own training program submission.

FRA’s decision to accept programs filed by parent or holding companies on behalf of their subsidiaries is based on the recognition that companies that are legally related may often share company rules or operating practices that make it possible to share a training program. Meanwhile, there are legal considerations that parent companies, holding companies, and their subsidiary companies must consider before filing a program under part 243 and FRA expects that all companies involved will discuss and agree to the submission as represented to FRA. For instance, there is a legal difference between a holding company, which has a passive relationship with its subsidiaries because, in general, it does not participate in the daily decision making of the subsidiaries and each subsidiary has its own management running those day-to-day

operations, and a parent company. A parent company typically has its own business operations and will choose whether to be actively or directly involved in managing its subsidiaries. Accordingly, FRA's proposed revisions to this section are intended to ensure that all companies covered by a submission are legally bound and accept the submission, and that subsidiaries may opt out of a parent or holding company's submission, in whole or in part.

#### *Section 243.5 Definitions*

To codify existing guidance and respond to questions from industry, FRA is proposing to revise two definitions and add one new definition to part 243. Specifically, FRA proposes to revise the existing definitions of the terms "designated instructor" and "refresher training," and add a definition for the term "training organizations or learning institutions."

First, FRA proposes to revise the definition of "designated instructor." As currently defined, a "designated instructor" is "a person designated as such by an employer, training organization, or learning institution, who has demonstrated, pursuant to the [applicable] training program . . . an adequate knowledge of the subject matter under instruction, and where applicable, has the necessary experience to effectively provide formal training." FRA understands that some industry members read this definition to mean that to be a "designated instructor" a person must be: (1) an employee of the employer; and (2) "qualified" as that term is used in part 243. To clarify these issues, FRA is proposing to add two sentences to the existing definition. The first proposed sentence would specify that a "designated instructor" is not required to be an employee of the employer and thus designated instructors can be in-house employees or outside contractors, such as professional trainers. The second proposed sentence would explain that employers are required to ensure that employees and non-employees used as designated instructors have the necessary knowledge, skills, and abilities to provide

sound coaching, mentoring, and guidance to new learners. FRA notes, however, that “designated instructors” are not required to be “qualified” as that term is defined in part 243.

FRA proposes to revise the definition of “refresher training” to explain that the purpose of this type of training is to improve the job performance of existing employees by acquainting them with any changed standards, any relevant problematic issues or new skills, methods, and processes, and to ensure no important skills or knowledge have been lost due to lack of use. This proposed explanation is intended to distinguish refresher training from initial training, which is targeted to employees who generally are new to the subject matter. FRA also proposes to revise the definition of “refresher training” to acknowledge that FRA has referred to refresher training in its other railroad safety regulations with a variety of terms and that those refresher training programs or plans required in its other railroad safety regulations need not be submitted for review pursuant to § 243.103(b). This proposed acknowledgment is intended to be read in conjunction with the proposal in § 243.201(e) that refresher training be at an interval not to exceed three calendar years from the date of an employee’s last training event, except where refresher training is specifically required more frequently in accordance with this chapter. Thus, for example, if FRA requires “recurrent training” each calendar year in a different FRA rail safety regulation, then that more stringent refresher training requirement would not be superseded by the more relaxed refresher training requirement of three calendar years in § 243.201(e). In addition, FRA is proposing revisions to the refresher training requirements and options in § 243.201(e) that would clarify what employers need to include, at a minimum, to complete acceptable refresher training.

FRA also proposes to add a definition of “training organizations or learning institutions” to clarify which businesses that provide training to employers are “training organizations or learning institutions.” FRA’s proposed definition identifies four

characteristics of a training organization or learning institution. First, a training organization or learning institution is an entity that provides training services for people who are safety-related railroad employees or independent students who will rely on the training services provided to qualify to become safety-related railroad employees, but not employees of the entity providing the training. This proposed characteristic is intended to clarify that FRA's training organization or learning institution definition does not include an employer providing training to its employees. Second, the proposed definition identifies the main examples of training organizations and learning institutions as businesses that provide formal training, and colleges and universities that provide rail safety courses necessary for a person to qualify as a safety-related railroad employee. A business that performs consulting work or some type of training that does not rise to the level of "formal training," as defined in part 243, would not be considered a training organization or learning institution. Third, the proposed definition explains that even though an entity may not maintain a fixed training facility, it could still be considered a training organization or learning institution as it could rent or lease meeting space to deliver training, deliver training at an employer's facility, or deliver virtual training. Thus, the proposed definition would clarify that a business that goes to an employer's property to deliver formal training may be considered a "training organization or learning institution." Fourth, while some railroads have in-house training for their employees and also train safety-related railroad employees of other employers, FRA does not consider these railroads as training organizations or learning institutions, and therefore proposes to clarify that exclusion.

## **Subpart B – Program Components and Approval Process**

### *Section 243.101 Employer Program Required*

FRA is proposing to delete paragraphs (a)(1) and (2) and state the employer requirement to submit, adopt, and comply with a training program for its safety-related

railroad employees in paragraph (a) without implementation dates. Paragraphs (a)(1) and (2) are no longer needed as the implementation deadlines specified in those existing requirements have already passed and all employers currently must comply.

Paragraph (b) requires that employers commencing operations after January 1, 2020, submit, adopt, and comply with a training program before commencing operations. As above, paragraph (b) would also be revised to remove the implementation date that has passed. Thus, the proposed rule would apply any time an employer commences operations.

In response to the Associations' request, proposed revisions to paragraph (c) clarify that employers may create programs based on applicable CFR parts, United States Code sections, or citations to orders. Accordingly, FRA is proposing to revise paragraph (c)(1) to clarify what it means for an employer to classify its safety-related railroad employees by "other suitable terminology," which includes references to the applicable part of the CFR, section of the United States Code, or citation to an order. Also, FRA proposes to revise paragraphs (c)(2) and (3) to exclude an employer that classifies its safety-related railroad employees by direct reference to Federal railroad safety laws, regulations, and orders because the existing requirement would be redundant for an employer who classifies in that way.

FRA proposes to revise paragraph (c)(5) to codify guidance that OJT is required when tasks require neuromuscular coordination to learn unless FRA approves alternative, formal training that addresses the need to practice safety-related tasks with the ability to objectively measure task completion proficiency.<sup>19</sup> As background, some employers or training organizations may have access to state-of-the-art indoor/outdoor training facilities that permit students to practice tasks that require neuromuscular coordination to

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<sup>19</sup> *Id.* at 15.

learn in a controlled environment with minimal or no risk of personal injury. Other approaches may include classroom practical exercises, role play, lab simulation, VR, and other emerging technologies. FRA's proposal recognizes that some safety-related tasks that require neuromuscular coordination can be taught effectively through formal training other than traditional OJT.

Paragraph (e) requires a contractor that chooses to train its own safety-related railroad employees to provide each railroad that utilizes its services with a document indicating that the contractor's training program was approved by FRA. However, paragraph (e) does not account for the fact that some similar training programs or plans, pursuant to other regulatory requirements contained elsewhere in this chapter, are not required to be submitted in accordance with part 243 and, therefore, the contractor would not have a document that it could show a railroad validating FRA's approval of that program. For this reason, FRA is proposing to change this requirement. To the extent that a contractor chooses to train its own safety-related railroad employees with an FRA-approved program under part 243, FRA proposes that the contractor provide each railroad utilizing the program with a document declaring or proving that its training program was approved by FRA. However, as proposed, if a contractor is not required to submit the training program or plan as permitted by § 243.103(b), but is maintaining the similar training program or plan pursuant to other regulatory requirements contained elsewhere in this chapter, then the contractor's requirement to provide the railroad with a document is limited to declaring or proving that information. For this proposed requirement, any FRA approval document will be considered sufficient proof and, when that proof is unavailable, a contractor may simply declare that the statement in the document is true. FRA is also proposing revisions to paragraph (f) that would similarly change the type of document a railroad is responsible to retain based on the proposed corresponding changes in paragraph (e).



### *Section 243.103 Training Components Identified in Program*

FRA is proposing four revisions to the requirements in this existing section.

Paragraph (a)(1) requires each employer's program to include a unique name and identifier for each formal course of study. The proposed revision to this requirement clarifies that the types of formal courses needing a unique name and identifier include both initial and refresher training courses. An initial or refresher training course that FRA has previously approved would not need a new unique name and identifier each time it is revised.

Paragraph (a)(2)(v) requires each employer's program to include a course outline, and the outline to include the anticipated course duration. However, the existing requirement does not specify whether the anticipated course duration includes OJT. Accordingly, FRA proposes revising this paragraph to provide that the employer's course outline for each course include the anticipated course duration for all formal training combined, apart from OJT.

The proposed revisions to paragraph (b) would clarify which "similar training programs or plans" that FRA requires in its other rail safety regulations do not have to be submitted to FRA under part 243. Additionally, proposed paragraph (b) would clarify that if an employer needs to amend any such similar program or plan required by an FRA railroad safety regulation, other than part 243, the employer is required to amend its program but not submit it to FRA under § 243.109.

FRA is proposing to amend paragraph (d) to clarify that an employer is not required to submit courseware (i.e., lesson plans, instructor guides, participant guides, job aids, practical exercises, tests/assessments, and other materials used in the delivery of any course) as part of a training program submission, although FRA may require an employer to provide FRA with such program courseware upon request.

### *Section 243.105 Optional Model Program Development*

FRA is proposing several revisions to this existing section, which permits the optional development of model programs that can be adopted by multiple employers. The proposed changes would remove a requirement no longer necessary and add information to the regulatory text that was previously issued as guidance.

FRA proposes to remove paragraph (a)(3) as it is no longer needed. The existing paragraph provided model program developers with the option to file model training programs by May 1, 2019, to guarantee an FRA review process of no more than 180 days. The existing requirement is no longer needed because the deadline for early filing passed.

The proposed revisions to paragraph (b) would add information intended to help an employer that is planning to use a model program. Existing paragraph (b) already specifies that an employer that chooses to use an FRA-approved model program must submit only the unique identifier associated with the program, and all other information that is specific to that employer or deviates from the model program. However, proposed paragraph (b) would contain information about how an employer can go to FRA's part 243 web portal, obtain contact information from a model program developer, and contact that developer to access the courseware associated with the model program. Further, FRA is proposing to revise paragraph (b) to confirm that an employer that submits, adopts, and implements an FRA-approved model program, consistent with the operations of that employer, will be considered in compliance with the employer program requirements of § 243.101.

FRA proposes adding paragraph (c) to address how model program developers are required to provide notice of any FRA-approved changes to authorized users. FRA proposes that sufficient notice of any FRA-approved changes may depend on whether the model program developer loosely allows adoption of the model program by anyone with access to the developer's website or more stringently requires an employer to obtain

explicit authorization to use a model program. In short, FRA proposes that the model program developer disseminate its FRA-approved updates in at least the same (and no less stringent) manner as it made the model program available to employer users.

*Section 243.107 Training Program Submission, Introductory Information Required*

FRA proposes amending paragraph (a) to remove the requirement that an employer that does not provide, but is responsible for, training for its safety-related railroad employees must submit a training program. FRA also proposes adding a sentence to paragraph (a) notifying employers using FRA's part 243 web portal that the web portal will prompt the employers to provide the information required in this section. Thus, an employer using FRA's part 243 web portal would not need to provide this information elsewhere in its submission as the web portal itself will prompt the employer to provide the information.

FRA also proposes amending paragraph (a) to reduce the types of information required at the time of filing. The types of information paragraphs (a)(4) and (5) require do not directly apply to employers that must submit training programs and thus the requirements are unnecessary. Accordingly, FRA proposes deleting both requirements, and redesignating and revising paragraph (a)(6) as (a)(4).

Similarly, paragraphs (b) and (c) require a level of detail that is unnecessary for FRA to evaluate an employer's training program submission. Paragraph (b) requires an employer to provide FRA with information about the different methods it will utilize to train its various categories of safety-related railroad employees. Paragraph (c) requires an employer to provide FRA with information about the training organizations or learning institutions it elects to use to train all or some of its safety-related railroad employees. FRA recognizes that the agency can determine this information during an audit or investigation. For this reason, FRA proposes to remove paragraphs (b) and (c) in their entirety and would reserve paragraph (b).

*Section 243.109 Initial and refresher training program submission, review, and approval process*

FRA is proposing revisions to this section clarifying that refresher training programs must be submitted to FRA for review and approval in the same manner as an employer's initial training program. This proposal includes revising the heading of this section to make clear that it addresses the submission, review, and approval process for both initial and refresher training programs. Similarly, FRA proposes revising the introductory heading in paragraph (a), which refers only to initial programs, so that it refers to both initial and refresher training programs. Finally, FRA is proposing to revise paragraph (a)(2) to reference both initial and refresher programs.

*Section 243.111 Approval of Programs Filed by Training Organizations or Learning Institutions*

FRA proposes several revisions to this section to remove unnecessary requirements and eliminate regulatory ambiguity.

Paragraph (a) currently requires a training organization or learning institution to submit its program to FRA for review and approval. Because FRA received inquiries from the Associations, and some employers, requesting guidance on whether they would need to resubmit a previously approved employer program so they could also be recognized under part 243 as a training organization or learning institution, FRA proposes new requirements to address the issue. Accordingly, when an entity has previously received FRA approval of a model program under § 243.105 or an employer program under § 243.101, under proposed paragraph (a)(1) the program does not need to be submitted a second time for FRA's approval. Meanwhile, FRA proposes requiring in paragraph (a)(2) that an entity with such a previously approved program must submit an informational filing to its previously approved program containing the information

required in paragraph (c) of this section for a training organization or learning institution program.

The proposed revisions to paragraph (c) would remove paragraphs (5) through (7), which require programs submitted by training organizations and learning institutions to include designated instructors' resumes, a list of employer customers, and a summary showing the methodology used to develop training programs. FRA proposes deleting these three requirements because FRA is not an educational accrediting agency and finds that the existing requirements may wrongly suggest FRA would be deciding whether each training organization or learning institution is suitable to provide such training when that is a decision for each employer to make. By deleting these three existing requirements, the regulation would make clear that FRA approves training programs and not any particular training organization or learning institution. In other words, no training organization or learning institution should refer to itself as "FRA-approved" but it may say that its training program is "FRA-approved."

FRA proposes revising paragraph (e) to clarify that a training organization or learning institution may transfer an approved program to another training organization or learning institution, or an employer. As proposed, the acquiring entity need only submit an informational filing with FRA noting the transfer unless the acquiring entity is making substantial additions or revisions to the previously approved program. If the acquiring entity is making substantial additions or revisions to the previously approved program, then the acquiring entity must obtain FRA's approval of those changes pursuant to paragraph (f) of this section. FRA is considering an alternative requirement that the acquiring entity will need to submit the entire previously approved program under the acquiring entity's web portal account for administrative reasons.

#### *243.113 Electronic and Written Program Submission Requirements*

FRA proposes several revisions to this section to clarify that when FRA refers to electronic program or informational filings submission requirements, FRA means submission through FRA's part 243 web portal. For example, paragraph (a) would be revised to specifically reference FRA's part 243 web portal and to inform electronic submitters that the web portal will prompt them to submit all required training program information.

FRA proposes the elimination of the written program submission option for an employer with less than 400,000 total employee work hours annually. For this reason, FRA proposes deleting that option from paragraph (a) and removing existing paragraphs (d) through (f). The cost in time and resources to print and mail a submission is likely the equivalent to the time and resources needed for a person to go to FRA's part 243 web portal, fill out the information required, and upload the submission documents. For these reasons, this proposed requirement is not expected to increase the costs on an employer with less than 400,000 total employee work hours annually, while reducing administrative and cost burdens for FRA personnel that would need to receive the written program, scan it, and upload it to FRA's part 243 web portal.

In paragraph (b), FRA proposes to clarify that a submitter will need to register for access to the part 243 web portal through a website before being granted web portal access.

In paragraph (c), FRA proposes to clarify that the electronic submitters providing consent are the users of FRA's part 243 web portal. FRA also proposes adding for clarity the existing paragraph (e) requirement that a person that electronically submits documents to FRA shall be considered to have provided their consent for FRA to electronically store those materials required by this part.

## **Subpart C – Program Implementation and Oversight Requirements**

### *Section 243.201 Employee Qualification Requirements*

FRA proposes revising this section to provide more direction on what must be included in refresher training, and how refresher training is distinguished from initial training.

FRA proposes several revisions and additions to paragraph (a). The revisions include the removal of implementation dates that have passed. Proposed paragraph (a)(1) includes the existing requirement that each employer must only permit employees appropriately trained and qualified to perform safety-related service. Proposed paragraph (a)(2) addresses the Associations' petitions by permitting an employer to limit a safety-related railroad employee's training to only the relevant Federal requirements that apply to the safety-related tasks that the employer authorizes the employee to perform, in addition to any knowledge-based training that is required. FRA proposes to move the requirement for designating existing employees by occupational category or subcategory in current paragraph (a)(1) to proposed paragraph (a)(3)(i).

FRA also proposes adding paragraph (a)(3)(ii) to address an issue, like the one addressed in proposed § 243.101(c), concerning employers that prefer to categorize their employees by CFR parts or other legal requirements, rather than by occupational category or subcategory. Proposed paragraph (a)(3)(ii) addresses employers that do not designate employees by department, occupational category, or subcategory. For those employers who do not designate employees, paragraph (a)(3)(ii) proposes that the employer must retain a record for each employee identifying the list of Federal railroad safety laws, regulations, and orders that cover the work the person is designated as qualified to perform.

In response to the Associations' request, FRA proposes to revise paragraph (c)(2) to allow an employee, who is not yet qualified, to perform tasks during OJT under the direct onsite observation of a qualified person and in accordance with certain conditions for the qualified person, before the employee has completed all of the formal training,

including classroom training and OJT. The existing rule requires the employee to complete classroom or other formal training, before the employer may allow an employee, who is not yet qualified, to perform tasks during OJT under the direct onsite observation of a qualified person, and under the same specified conditions for the qualified person. The proposed change would not be expected to impact safety detrimentally as the employee would still be required to perform the OJT tasks under the direct onsite observation of a qualified person, provided the qualified person has been advised of the circumstances and is capable of intervening if an unsafe act or non-compliance with Federal railroad safety laws, regulations, or orders is observed.

FRA proposes to amend paragraph (d), which addresses how an employer can avoid training an employee that was previously trained or qualified by an entity other than the current employer. FRA is not proposing to amend the existing options in paragraphs (d)(1) and (2). Instead, FRA proposes changing “FRA-approved” to “FRA-required,” and “submitted” to “completed” to coincide with other changes in this proposed rule. The rule currently requires that, in order to exercise one of the options, the employee’s training or qualification must have been provided previously “through participation in a FRA-approved training program” that was submitted by an entity other than the employee’s current employer. Through the proposed changes to § 243.103(b), FRA is recognizing that an employee could have been previously trained or qualified by an entity other than the current employer using a similar training program or plan, pursuant to other regulatory requirements contained elsewhere in this chapter that do not require submission to FRA or FRA-approval.

In conjunction with the proposed definition of “refresher training,” FRA proposes revisions to the requirements for refresher training in paragraph (e). Specifically, proposed paragraph (e)(3)(i) would require as a baseline that the employer ensure that each employee’s refresher training include notification of changes to any rule, practice, or



procedure relevant to the employee's assigned duties. Proposed paragraph (e)(3)(ii) would clarify that each employer must ensure that an employee is not allowed to test out of refresher training. Proposed paragraph (e)(3)(iii) would include the sentence in existing paragraphs (e)(1) and (2) which is intended to capture that, ultimately, the employer is required to ensure that the employee is trained and qualified on the application of any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. That existing requirement is for ensuring that refresher training is used to fill any gaps in an employee's knowledge base. FRA recognizes that proposed paragraphs (e)(1) and (2) contain "beginning" implementation dates that may no longer be relevant when a final rule is published and will make changes to these paragraphs to remove the unnecessary implementation dates that have passed.

Proposed paragraph (e)(3)(iii) also describes the options available to employers for refresher training. For instance, rather than repeating initial training, refresher training may be limited and carefully tailored to review: (1) all the required steps of a complicated safety-related task; (2) existing rules or procedures that were initially learned but rarely used; and (3) safety-related tasks that address skill gaps that the employer identified in the workforce through efficiency testing, periodic oversight, annual reviews, accident/incident data, FRA inspection data, or other performance measuring metrics.

FRA is proposing to add paragraph (f) to require an employer to consider ways to provide remedial training and retesting of any employee who fails to successfully pass any training or testing. Additionally, proposed paragraph (f) would make clear that a failure of any test or training does not bar the person from successfully completing the training or testing later.

#### *Section 243.203 Records*

FRA proposes revisions to paragraph (b)(2) of this section to clarify that an employer that designates its employees by “other suitable terminology,” i.e., other than occupational category or subcategory, is required to keep a record of that designation for each qualification of each qualified employee. This proposed revision is intended to work in tandem with the other proposed requirements, §§ 243.101(c) and 243.201(a)(2)(ii), which would permit an employer to categorize its employees by CFR parts or other Federal railroad safety legal requirements, rather than by occupational category or subcategory.

In addition, FRA proposes revising paragraph (b)(6)’s recordkeeping information requirement to clarify that the person determining that the employee successfully completed all OJT training necessary to be considered qualified to perform certain safety-related tasks must be a designated instructor. The existing rule does not specify that the person making this determination must be a designated instructor, but instead only requires that the record identify the person. Proposed revisions to paragraph (b)(6) would also add “other suitable terminology” to the phrase “occupational categories or subcategories.”

FRA is proposing to revise the recordkeeping requirement for records other than individual employee records and annual review records, for consistency with part 217 of this chapter. The existing requirement in § 243.203(c) requires each employer to maintain test, inspection, and other event records that do not demonstrate the qualification status of a safety-related railroad employee, for a period of three calendar years after the end of the calendar year to which the event relates. FRA received feedback from the Associations that this recordkeeping requirement is more stringent than FRA’s requirement for operational tests and inspections under 49 CFR 217.9(d)(1). As the test and inspection records in the two regulations are similar and are required to be kept for similar reasons, FRA proposes this change. No change is proposed for the

existing annual review recordkeeping requirement in § 243.203(c), as 49 CFR 217.9(f) also has a similar annual review recordkeeping requirement of the same length and likewise is required to be retained for similar reasons.

#### *Section 243.205 Periodic Oversight*

FRA is generally proposing two changes to § 243.205. Changes to proposed paragraphs (a), (c), (d), (e)(1), (g), and (i) would, as requested in the Associations' petitions, allow periodic oversight to be limited to tests "or" inspections, rather than require both tests "and" inspections. In the context of periodic oversight, a "test" is conducted by a qualified supervisor who changes the work environment so that one or more employees would need to act to prevent non-compliance, while an "inspection" involves a qualified supervisor observing one or more employees at a job site and determining whether the employees are in compliance.<sup>20</sup> In revisiting the current requirement for both tests and inspections, FRA recognizes that tests are more difficult to design and execute, while inspections can be completed through routine observations. By revisiting this section, FRA recognizes that the goal of periodic inspection may be achieved by tests or inspections, and that both tests and inspections may have set a higher bar than a minimum requirement.

FRA also proposes to revise § 243.205(h) to provide railroads and contractors the flexibility to decide which entity would be responsible for conducting periodic oversight. This proposed revision to the periodic oversight requirements would address an issue raised in the Associations' petitions, which asked that FRA allow a railroad and a contractor to agree to any division of the periodic oversight responsibility requirements that the parties desire, rather than be bound by the required assigned responsibilities in

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<sup>20</sup> 79 FR 66487.

the regulation. From a safety perspective, it does not make a difference whether periodic oversight is conducted by a railroad or a contractor. Thus, FRA proposes to revise § 243.205(h)(2) to state that, regardless of the requirements in § 243.205 that assign specific periodic oversight responsibilities to a railroad or contractor, these parties may agree to a different periodic oversight responsibility arrangement. This proposed revision will allow the regulated entities to decide which entity is in the best position to conduct the oversight and to make any necessary arrangements to comply with the periodic oversight requirements.

#### **IV. Regulatory Impact and Notices**

##### **A. Executive Order 12866**

This proposed rule is a non-significant regulatory action within the meaning of Executive Order (EO) 12866. FRA made this determination by finding that this proposed regulatory action did not meet the definition of “significant regulatory action” in Section 3(f) of EO 12866.

FRA is issuing the proposed rulemaking to address issues raised in the Associations’ petitions for rulemaking, provide clarity to current requirements, and remove requirements that are no longer necessary. For example, FRA proposes removing certain requirements from § 243.111 because FRA found some of the information submitted by training organizations and learning institutions to be unnecessary. FRA also proposes removing implementation dates that have passed. Overall, most changes would codify existing regulatory guidance that FRA has issued.

The proposed rule would provide regulatory clarity and promote regulatory compliance by the regulated industry through, among other things: (1) clarifying that FRA will accept a training program that categorizes employees by legal requirement references rather than occupational categories; (2) eliminating certain submissions such as similar training programs or plans; (3) requiring that each employer under §

243.103(a)(2)(v) exclude the course duration of OJT for an employer's estimate of the anticipated course duration for all formal training combined; (4) clarifying the use of model programs without requiring an entity to refer to guidance or asking FRA for assistance; (5) amending requirements for training program submissions and the introductory information required in § 243.107 due to FRA's part 243 web portal; (6) revising § 243.109 to clarify refresher training program submission requirements; (7) requiring each training organization and learning institution provide less information in its submission than required currently by § 243.111; (8) revising the refresher training requirements and options, clarifying what employers need to include to complete minimum acceptable refresher training; and (9) allowing each railroad and contractor the flexibility to decide which entity would be responsible for conducting periodic oversight.

FRA expects the proposed rule would result in several, non-quantifiable benefits for the regulated industry and FRA, such as: permitting training programs that categorize employees by referencing the applicable part of the CFR, a statute, or an order, rather than occupational categories associated by craft; clarifying that an employer need not submit courseware unless FRA requests that additional documentation is needed to conduct an adequate review; and clarifying what employers need to include to complete minimum acceptable refresher training, as well as allow for tests or inspections, instead of requiring both. FRA expects these clarifications would provide employers an easier means of complying with this regulation, as well as save time understanding what needs to be submitted and preparing submissions to FRA. By codifying existing regulatory guidance, FRA expects that the railroads would have greater regulatory certainty for future submissions while complying with training program requirements. FRA estimates that there will be no costs associated with this proposed rulemaking. FRA requests comments on the benefits and costs related to this proposed rule.

**B. Regulatory Flexibility Act and Executive Order 13272**

The Regulatory Flexibility Act of 1980<sup>21</sup> and EO 13272<sup>22</sup> require agency review of proposed and final rules to assess their impacts on small entities. An agency must prepare an Initial Regulatory Flexibility Analysis (IRFA) unless it determines and certifies that a rule, if promulgated, would not have a significant economic impact on a substantial number of small entities.

This proposed rule directly affects all railroads, of which there are approximately 754. FRA estimates that approximately 93 percent of these railroads are small entities. This proposed rule also affects approximately 300 contractors of railroads and approximately 109 training organizations or learning institutions, most of which, by definition, are considered small entities. Therefore, FRA has determined that this proposed rule will have an impact on a substantial number of small entities.

The requirements of this proposed rule would apply to employers of safety-related railroad employees, whether the employers are railroads, contractors, or subcontractors. Although a substantial number of small entities would be subject to this proposed rule, the proposed rule would codify agency guidance, reduce submissions to FRA, and clarify existing requirements. Accordingly, the FRA Administrator hereby certifies that this proposed rule will not have a significant economic impact on a substantial number of small entities. FRA invites comment from members of the public who believe there will be a significant impact on small railroads.

### **C. Paperwork Reduction Act**

The information collection requirements in this proposed rule are being submitted for approval to the Office of Management and Budget (OMB) under the Paperwork

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<sup>21</sup> 5 U.S.C. 601 *et seq.*

<sup>22</sup> 67 FR 53461 (Aug. 16, 2002).

Reduction Act of 1995.<sup>23</sup> The sections that contain the proposed and current information collection requirements and the estimated time to fulfill each requirement are as follows:

CFR Section <sup>24</sup>	Respondent universe	Total Annual responses	Average time per responses	Total annual burden hours	Total cost equivalent <sup>25</sup>
243.3(c)—Application and responsibility for compliance—A parent or holding company that submits a training program on behalf of one or more subsidiaries must initially and continually maintain in its written submission a list of the legal name of each subsidiary (New requirements)	The estimated paperwork burden for this requirement is covered under 49 CFR 243.101(b).				
243.101(a)(2)—Training program required for each employer not covered by (a)(1) and subject to this part by May 1, 2021 <i>(includes burden associated with the usage of FRA's part 243 web portal and compliance guide.)</i>	1,046 railroads/ contractors	60 training programs	250 hours	15,000 hours	\$1,155,000
—(b) Submission by new employers commencing operations after Jan. 1, 2020, not covered by (a)(2)	10 new railroads/ contractors	10 training programs	20 hours	200 hours	\$24,000
—(c) and (d) Employer's classification of its safety-related railroad employees and on-the-job (OJT) training requirements	The burden for this requirement is included under § 243.101.				
—(e) Contractor's duty to validate approved program to a railroad <i>(Revised requirement text, no impact on burden)</i>	400 railroads/ contractors	50 documents	15 minutes	12.5 hours	\$963
—(f) Railroad's duty to retain copies of contractor's validation document <i>(Revised requirement text, no impact on burden)</i>	10 new railroads	10 copies	2 minutes	.3 hours	\$23

<sup>23</sup> 44 U.S.C. 3501 *et seq.*

<sup>24</sup> FRA will be requesting to revise the previously approved OMB control number (OMB No. 2130-0597) corresponding to existing part 243.

<sup>25</sup> The dollar equivalent cost is derived from the Surface Transportation Board's Full Year Wage A&B data series using the appropriate employee group hourly wage rate that includes a 75-percent overhead charge.

243.103(a) and (c)— Training components identified in program <i>(Revised requirement text, no impact on burden)</i>	The burden requirements for paragraphs (a) and (c) are included under § 243.101(a) and (b). Regarding the burden for paragraph (b), FRA estimates that it will receive zero (0) supplementary document.				
—(d) Training components identified in program; modifications to components of the training programs <i>(Revised requirement text, no impact on burden)</i>	1,155 railroads/ contractors	70 modified training programs	5 hours	350 hours	\$26,950
243.105(a) and (b)— Optional model program development <i>(Revised requirement text, no impact on burden)</i>	The burden requirement for paragraph (a) has been fulfilled. The burden for paragraph (b) is included under § 243.101(a)-(b).				
—(c) Optional model program development; model program revisions: notice of FRA-approved changes to authorized users <i>(New requirement)</i>	30 model programs	10 notifications	10 minutes	2 hours	\$154
243.107(a)—Training program submission, introductory information required <i>(Revised requirement text, no impact on burden)</i>	The burden for this requirement has been fulfilled.				
243.109(b)—Previously approved programs requiring an informational filing when modified <i>(Revised requirement text, no impact on burden)</i>	1,155 railroads/ contractors/ learning institutions	10 informational filings	8 hours	80 hours	\$6,160
—(c) New portions or substantial revisions to an approved training program	10 railroads/ contractors	10 revised training programs	16 hours	160 hours	\$12,320
—(c) New portions or substantial revisions to an approved training program found non-conforming to this part by FRA—revisions required	5 railroads/ contractors	5 revised training programs	8 hours	40 hours	\$3,080
—(d)(1)(i) Copy of additional submissions, resubmissions, and informational filings to labor organization presidents	10 railroads/ contractors	25 copies	10 minutes	4.2 hours	\$323



—(d)(1)(ii) Railroad statement affirming that a copy of submissions, resubmissions, or informational filings has been served to labor organization presidents	228 railroads/ contractors	76 affirming statements	10 minutes	12.7 hours	\$978
—(d)(2) Labor comments on railroad training program submissions, resubmissions, or informational filings	228 railroads' labor organizations	1 comment	30 minutes	0.5 hours	\$39
243.111(a) through (f)— Approval of programs filed by training organizations or learning institutions (TO/LI) <i>(Revised requirement text, no impact on burden)</i>	The burden requirements for paragraphs (a) and (c) are included under § 243.101(a) and (b). The burden requirement for paragraphs (b) and (d) are covered under § 243.103(d). The burden requirement for paragraphs (e) and (f) are covered under § 243.109(b).				
—(g) Safety-related railroad employees instructed by TO/LI — Recordkeeping	109 TO/LI	5,450 records	5 minutes	454.2 hours	\$34,973
—(h) TO/LI to provide student's training transcript or training record to any employer upon request by the student	109 TO/LI	545 records	5 minutes	45.4 hours	\$3,496
243.113—Electronic and written program submission requirements <i>(Revised requirement text, no impact on burden)</i>	The burden requirement for paragraph (a) has been fulfilled. The burden for paragraph (b) is included under § 243.101(a)-(b).				
243.201(a)(2)— Designation of existing safety-related railroad employees by job category (for employers not covered by (a)(1) and subject to this part by January 1, 2022) <i>(Revised requirement text, no impact on burden)</i>	1,039 railroads/ contractors	346 designation lists	15 minutes	86.5 hours	\$6,661
—(b) New employers operating after January 1, 2020, not covered by (a)(2), designation of safety-related employees by job category—Lists	10 new railroads/ contractors	10 designation lists	15 minutes	2.5 hours	\$193
—(c) Training records of newly hired employees or those assigned new safety-related duties <i>(Revised requirement text, no impact on burden)</i>	4,800 employees	4,800 records	15 minutes	1,200 hours	\$92,400

—(d)(1)(i) Requests for relevant qualification or training record from an entity other than current employer ( <i>Revised requirement text, no impact on burden</i> )	4,800 employees	960 record requests	5 minutes	80 hours	\$6,160
243.203(a) through (e) Recordkeeping—Systems set up to meet FRA requirements ( <i>Revised requirement text, no impact on burden</i> )	1,155 railroads/contractors/TOLI	1,046 recordkeeping systems	30 minutes	523 hours	\$40,271
—(f) Transfer of records to successor employer	1,155 railroads/contractors/TOLI	3 records	30 minutes	1.5 hours	\$116
243.205(a), (b), (e) and (g) —Periodic oversight ( <i>Revised requirement text, no impact on burden</i> )	The burden for adopting and complying with a program of periodic oversight under paragraph (a) is included above under the training program requirements in §§ 243.101(a)(2) and 243.109. Furthermore, FRA estimates that zero (0) training programs will be changed as the result of the assessments under parts 240 and 242.				
—(c) Railroad identification of supervisory employees who conduct periodic oversight tests by category/subcategory ( <i>Revised requirement text, no impact on burden</i> )	300 contractors	100 identifications	5 minutes	8.3 hours	\$639
—(f) Notification by RR of contractor employee non-compliance with Federal laws/regulations/orders to employee and employee's employer	300 contractors	90 employee notices	10 minutes	15 hours	\$1,155
—(f) Notification by RR of contractor employee non-compliance with Federal laws/regulations/orders to employee and employee's employer	300 contractors	270 employer notices	10 minutes	45 hours	\$3,465
—(i) and (j) Employer records of periodic oversight ( <i>Revised requirement text under paragraph (i), no impact on burden</i> )	1,046 railroads/contractors	150,000 records	5 minutes	12,500 hours	\$962,500
243.207(a)—Written annual review of safety data (Railroads with 400,000 annual employee work hours or more)	22 railroads	22 reviews	16 hours	352 hours	\$27,104
—(b) Railroad copy of written annual review at system headquarters	22 railroads	22 review copies	5 minutes	1.8 hours	\$139

—(e) Railroad notification to contractor of relevant training program adjustments	22 railroads	2 notifications	15 minutes	.5 hours	\$39
243.209(a) and (b)—Railroad maintained list of contractors utilized	754 railroads	754 lists	30 minutes	377 hours	\$29,029
—(c) Railroad duty to update list of contractors utilized and retain record for at least 3 years showing if a contractor was utilized in last 3 years	754 railroads	75 updated lists	15 minutes	18.8 hours	\$1,444
Total	1,155 railroads/ contractors/training organizations/ learning institutions	164,832 responses	N/A	31,574 hours	\$2,439,774

All estimates include the time for reviewing instructions; searching existing data sources; gathering or maintaining the needed data; and reviewing the information.

Pursuant to 44 U.S.C. 3506(c)(2)(B), FRA solicits comments concerning: whether these information collection requirements are necessary for the proper performance of the functions of FRA, including whether the information has practical utility; the accuracy of FRA's estimates of the burden of the information collection requirements; the quality, utility, and clarity of the information to be collected; and whether the burden of collection of information on those who are to respond, including through the use of automated collection techniques or other forms of information technology, may be minimized. For information or a copy of the paperwork package submitted to OMB, contact Ms. Hodan Wells, Information Collection Clearance Officer, at 202-493-0440.

Organizations and individuals desiring to submit comments on the collection of information requirements should direct them to Ms. Hodan Wells via email at *Hodan.Wells@dot.gov*.

OMB is required to make a decision concerning the collection of information requirements contained in this proposed rule between 30 and 60 days after publication of this document in the **Federal Register**. Therefore, a comment to OMB is best assured of

having its full effect if OMB receives it within 30 days of publication. The final rule will respond to any OMB or public comments on the information collection requirements contained in this proposal.

FRA is not authorized to impose a penalty on persons for violating information collection requirements that do not display a current OMB control number, if required. FRA intends to obtain current OMB control numbers for any new information collection requirements resulting from this rulemaking action prior to the effective date of the final rule. The OMB control number, when assigned, will be announced by separate notice in the **Federal Register**.

#### **D. Federalism Implications**

Executive Order 13132, “Federalism,”<sup>26</sup> requires FRA to develop an accountable process to ensure “meaningful and timely input by State and local officials in the development of regulatory policies that have federalism implications.” “Policies that have federalism implications” are defined in the Executive Order to include regulations that have “substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government.” Under Executive Order 13132, the agency may not issue a regulation with federalism implications that imposes substantial direct compliance costs and that is not required by statute, unless the Federal government provides the funds necessary to pay the direct compliance costs incurred by State and local governments or the agency consults with State and local government officials early in the process of developing the regulation. Where a regulation has federalism implications and preempts State law, the agency seeks to consult with State and local officials in the process of developing the regulation.

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<sup>26</sup> 64 FR 43255 (Aug. 10, 1999).

FRA has analyzed the proposed rule under the principles and criteria contained in Executive Order 13132. This proposed rule would not have substantial direct effects on the States, on the relationship between the national government and the States, or on the distribution of power and responsibilities among the various levels of government. In addition, FRA has determined that the proposed rule would not impose substantial direct compliance costs on State and local governments. Therefore, the consultation and funding requirements of Executive Order 13132 would not apply. However, this proposed rule could have preemptive effect by operation of law under certain provisions of the Federal railroad safety statutes, specifically the former Federal Railroad Safety Act of 1970, repealed and recodified at 49 U.S.C. 20106. Section 20106 provides that States may not adopt or continue in effect any law, regulation, or order related to railroad safety or security that covers the subject matter of a regulation prescribed or order issued by the Secretary of Transportation (with respect to railroad safety matters) or the Secretary of Homeland Security (with respect to railroad security matters), except when the State law, regulation, or order qualifies under the “essentially local safety or security hazard” exception to section 20106.

In sum, FRA has analyzed this proposed rule under the principles and criteria in Executive Order 13132. As explained above, FRA has determined this proposed rule has no federalism implications, other than the possible preemption of State laws under Federal railroad safety statutes, specifically 49 U.S.C. 20106. Therefore, preparation of a federalism summary impact statement for this proposed rule is not required.

#### **E. International Trade Impact Assessment**

The Trade Agreements Act of 1979<sup>27</sup> prohibits Federal agencies from engaging in any standards or related activities that create unnecessary obstacles to the foreign

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<sup>27</sup> 19 U.S.C. Ch. 13.

commerce of the United States. Legitimate domestic objectives, such as safety, are not considered unnecessary obstacles. The statute also requires consideration of international standards and where appropriate, that they be the basis for U.S. standards. This proposed rule is purely domestic in nature and is not expected to affect trade opportunities for U.S. firms doing business overseas or for foreign firms doing business in the United States.

#### **F. Environmental Impact**

FRA has evaluated this proposed rule consistent with the National Environmental Policy Act (NEPA),<sup>28</sup> the Council on Environmental Quality's NEPA implementing regulations,<sup>29</sup> and FRA's NEPA implementing regulations<sup>30</sup> and determined that it is categorically excluded from environmental review and therefore does not require the preparation of an environmental assessment (EA) or environmental impact statement (EIS). Categorical exclusions (CEs) are actions identified in an agency's NEPA implementing regulations that do not normally have a significant impact on the environment and therefore do not require either an EA or EIS.<sup>31</sup> Specifically, FRA has determined that this proposed rule is categorically excluded from detailed environmental review.<sup>32</sup>

The purpose of this rulemaking is to codify agency guidance and clarify existing requirements for complying with FRA's regulation on the training, qualification, and oversight of safety-related railroad employees. This proposed rule does not directly or indirectly impact any environmental resources and would not result in significantly increased emissions of air or water pollutants or noise. In analyzing the applicability of a CE, FRA must also consider whether unusual circumstances are present that would

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<sup>28</sup> 42 U.S.C. 4321 *et seq.*

<sup>29</sup> 40 CFR parts 1500 through 1508.

<sup>30</sup> 23 CFR part 771

<sup>31</sup> 40 CFR 1508.4.

<sup>32</sup> See 23 CFR 771.116(c)(15) (categorically excluding "[p]romulgation of rules, the issuance of policy statements, the waiver or modification of existing regulatory requirements, or discretionary approvals that do not result in significantly increased emissions of air or water pollutants or noise").

warrant a more detailed environmental review.<sup>33</sup> FRA has concluded that no such unusual circumstances exist with respect to this proposed regulation and the proposal meets the requirements for categorical exclusion.<sup>34</sup>

Pursuant to Section 106 of the National Historic Preservation Act and its implementing regulations, FRA has determined this undertaking has no potential to affect historic properties.<sup>35</sup> FRA has also determined that this rulemaking would not approve a project resulting in a use of a resource protected by Section 4(f).<sup>36</sup>

#### **G. Executive Order 12898 (Environmental Justice)**

Executive Order 12898, “Federal Actions to Address Environmental Justice in Minority Populations and Low-Income Populations,” and DOT Order 5610.2C<sup>37</sup> require DOT agencies to achieve environmental justice as part of their mission by identifying and addressing, as appropriate, disproportionately high and adverse human health or environmental effects, including interrelated social and economic effects, of their programs, policies, and activities on minority populations and low-income populations. The DOT Order instructs DOT agencies to address compliance with Executive Order 12898 and requirements within the DOT Order in rulemaking activities, as appropriate, and also requires consideration of the benefits of transportation programs, policies, and other activities where minority populations and low-income populations benefit, at a minimum, to the same level as the general population as a whole when determining impacts on minority and low-income populations. FRA has evaluated this proposed rule under Executive Order 12898 and the DOT Order and has determined it would not cause disproportionately high and adverse human health and environmental effects on minority

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<sup>33</sup> 23 CFR 771.116(b).

<sup>34</sup> 23 CFR 771.116(c)(15).

<sup>35</sup> 54 U.S.C. 306108.

<sup>36</sup> Department of Transportation Act of 1966, as amended (Pub. L. 89-670, 80 Stat. 931); 49 U.S.C. 303.

<sup>37</sup> Available at: <https://www.transportation.gov/sites/dot.gov/files/Final-for-OST-C-210312-003-signed.pdf>.

populations or low-income populations.

## **H. Unfunded Mandates Reform Act of 1995**

Under section 201 of the Unfunded Mandates Reform Act of 1995<sup>38</sup> each Federal agency shall, unless otherwise prohibited by law, assess the effects of Federal regulatory actions on State, local, and tribal governments, and the private sector (other than to the extent that such regulations incorporate requirements specifically set forth in law).

Section 202 of the Act<sup>39</sup> further requires that before promulgating any general notice of proposed rulemaking that is likely to result in the promulgation of any rule that includes any Federal mandate that may result in expenditure by State, local, and tribal governments, in the aggregate, or by the private sector, of \$100,000,000 or more (adjusted annually for inflation) in any one year, and before promulgating any final rule for which a general notice of proposed rulemaking was published, the agency shall prepare a statement detailing the effect on State, local, and tribal governments and the private sector. This proposed rule would not result in such an expenditure, and thus preparation of such a statement is not required.

## **I. Energy Impact**

Executive Order 13211, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use,” requires Federal agencies to prepare a Statement of Energy Effects for any “significant energy action.”<sup>40</sup> FRA evaluated this proposed rule under Executive Order 13211 and determined that this regulatory action is not a “significant energy action” within the meaning of Executive Order 13211.

## **J. Privacy Act Statement**

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<sup>38</sup> Pub. L. 104-4, 2 U.S.C. 1531.

<sup>39</sup> 2 U.S.C. 1532.

<sup>40</sup> 66 FR 28355 (May 22, 2001).



In accordance with 5 U.S.C. 553(c), DOT solicits comments from the public to better inform its rulemaking process. DOT posts these comments, without edit, to [www.regulations.gov](http://www.regulations.gov), as described in the system of records notice, DOT/ALL-14 FDMS, accessible through <https://www.transportation.gov/privacy>. To facilitate comment tracking and response, we encourage commenters to provide their name, or the name of their organization; however, submission of names is completely optional. Whether or not commenters identify themselves, all timely comments will be fully considered. If you wish to provide comments containing proprietary or confidential information, please contact the agency for alternate submission instructions.

### **List of Subjects in 49 CFR Part 243**

Administrative practice and procedure, Penalties, Railroad employees, Railroad safety, Reporting and recordkeeping requirements.

### **The Proposed Rule**

For the reasons discussed in the preamble, FRA proposes to amend part 243 of chapter II, subtitle B of title 49 of the Code of Federal Regulations as follows:

### **PART 243—TRAINING, QUALIFICATION, AND OVERSIGHT FOR SAFETY-RELATED RAILROAD EMPLOYEES**

1. The authority citation for part 243 continues to read as follows:

**Authority:** 49 U.S.C. 20103, 20107, 20131-20155, 20162, 20301-20306, 20701-20702, 21301-21304, 21311; 28 U.S.C. 2461, note; and 49 CFR 1.89.

### **Subpart A—General**

2. Section 243.1 is amended by adding paragraphs (f) and (g) to read as follows:

#### **§ 243.1 Purpose and scope.**

\* \* \* \* \*

(f) The requirements in this part do not require an employer to adopt and comply with a training program when the training required for a qualified person is obtained through earning a college degree or certification from an accredited training organization or learning institution. For example, the requirements in this part do not require the training program of an engineering firm that conducts bridge inspections to include training of railroad bridge engineers on the subjects taught as part of a professional engineering curriculum covered by 49 CFR 237.51(b).

(g) The requirements in this part do not require an employer to train contractors who are hired to perform elective audits or assessments that are not required by Federal railroad safety laws, regulations, or orders.

3. Section 243.3 is amended by adding paragraph (c) to read as follows:

**§ 243.3 Application and responsibility for compliance.**

\* \* \* \* \*

(c)(1) A parent or holding company may comply with the requirements of this part on behalf of one or more subsidiaries if the arrangement is specified and submitted with the relevant training program(s) under subpart B of this part.

(i) The arrangement may be used to fulfill all or a portion of a subsidiary's responsibility for compliance with this part.

(ii) A parent or holding company that submits a training program on behalf of one or more subsidiaries must initially and continually maintain in its submission a list of the legal name of each subsidiary. The submission must reflect which courses each subsidiary is adopting if a subsidiary is not adopting the parent or holding company's training program in its entirety. The submission must reflect whether each subsidiary is adopting all of a parent or holding company's training programs or identify which courses each subsidiary is adopting.

(2) A subsidiary must not duplicate a training program submission a parent or holding company has made on its behalf.

(3) A subsidiary must file a training program submission, in accordance with the requirements of subpart B of this part, if a parent or holding company does not submit one or more training programs on behalf of the subsidiary that is intended to fulfill all of the subsidiary's responsibilities under this part.

(4) A subsidiary must comply with a parent or holding company's training program submission that is filed on behalf of the parent or holding company's subsidiaries unless the subsidiary files its own submission, in accordance with the requirements of subpart B of this part.

4. Section 243.5 is amended by revising the definitions for "Designated instructor" and "Refresher training" and adding a definition for "Training organizations or learning institutions," to read as follows:

**§ 243.5 Definitions.**

\* \* \* \* \*

*Designated instructor* means a person designated as such by an employer, training organization, or learning institution, who has demonstrated an adequate knowledge of the subject matter under instruction and, where applicable, has the necessary experience to effectively provide formal training on the subject matter. The designated instructor is not required to be an employee of the employer. Employers are required to ensure that employees and non-employees used as designated instructors have the necessary knowledge, skills, and abilities to provide sound coaching, mentoring, and guidance to new learners.

\* \* \* \* \*

*Refresher training* means periodic retraining required for each safety-related railroad employee that is designed to maintain, improve, and update the skills and

knowledge of existing employees to ensure they are sufficiently acquainted with any changed standards, or any relevant problematic issues or new skills, methods, and processes, and to ensure no important skills or knowledge have been lost due to lack of use. Similar training programs or plans required elsewhere in this chapter but identified by a term other than refresher training such as “recurrent training,” “re-training,” “periodic training,” “training that occurs periodically,” or “training that is required within defined intervals,” are considered refresher training for purposes of this subpart although they need not be submitted for review pursuant to § 243.103(b).

\* \* \* \* \*

*Training organizations or learning institutions* mean entities that provide training services for people who are safety-related railroad employees or independent students who will rely on the training services provided to qualify to become safety-related railroad employees, but not employees of the entities providing the training. Training organizations and learning institutions include businesses that provide formal training, and colleges and universities that provide rail safety courses, necessary for a person to qualify as a safety-related railroad employee. Training organizations and learning institutions also include entities that do not maintain fixed facilities (i.e., do not have a physical location), as they may rent or lease meeting space to deliver formal training, deliver formal training at an employer’s facility, or deliver computer-based training virtually. A railroad that trains its own employees and also trains safety-related railroad employees of other employers is not a training organization or learning institution.

#### **Subpart B—Program Components and Approval Process**

5. Section 243.101 is amended by revising paragraphs (a), (b), (c)(1) through (3), (c)(5), (e), and (f) to read as follows:

**§ 243.101      Employer program required.**

(a)      Each employer conducting operations subject to this part shall submit, adopt, and comply with a training program for its safety-related railroad employees.

(b)      Each employer that has not yet commenced operations subject to this part shall submit a training program for its safety-related railroad employees before commencing operations. Upon commencing operations, the employer shall adopt and comply with the training program.

(c)      \*           \*           \*

(1)      Classify its safety-related railroad employees in occupational categories or subcategories by craft, class, task, or other suitable terminology. Other suitable terminology for classifying safety-related railroad employees may include references to the applicable part of the Code of Federal Regulations, section of the United States Code, or citation to an order as described in paragraph (c)(2) of this section;

(2)      Define the occupational categories or subcategories of safety-related railroad employees. The definition of each category or subcategory shall include a list of the Federal railroad safety laws, regulations, and orders that the employee is required to comply with, based on the employee's assignments and duties, broken down at a minimum to the applicable part of the Code of Federal Regulations, section of the United States Code, or citation to an order. The listing of the Federal requirements shall contain the descriptive title of each law, regulation, or order. An employer that classifies its safety-related railroad employees by direct reference to the applicable part of the Code of Federal Regulations, section of the United States Code, or citation to an order as permitted in paragraph (c)(1) of this section, is not required to define the occupational categories or subcategories of its safety-related railroad employees;

(3)      Create tables or utilize other suitable formats which summarize the information required in paragraphs (c)(1) and (2) of this section, separated by major

railroad departments (e.g., operations, maintenance-of-way, maintenance-of-equipment, signal and communications). After listing the major departments, the tables or other formats should list the categories and subcategories of safety-related railroad employees within those departments. An employer that does not have major railroad departments and classifies its safety-related railroad employees by direct reference to the applicable part of the Code of Federal Regulations, section of the United States Code, or citation to an order, as permitted in paragraph (c)(1) of this section, is not required to summarize the information required in paragraphs (c)(1) and (2) of this section;

\* \* \* \* \*

(5) Determine how training shall be structured, developed, and delivered, including an appropriate combination of classroom, simulator, computer-based, correspondence, OJT, or other formal training. The curriculum shall be designed to impart knowledge of, and ability to comply with, applicable Federal railroad safety laws, regulations, and orders, as well as any relevant railroad rules and procedures promulgated to implement those applicable Federal railroad safety laws, regulations, and orders. OJT is required when tasks require neuromuscular coordination to learn, unless FRA approves alternative, formal training that addresses the need to practice safety-related tasks, with the ability to objectively measure task completion proficiency.

\* \* \* \* \*

(e) Contractor's responsibility to validate approved program to a railroad: A contractor is being utilized by a railroad when any of the contractor's employees conduct safety-related duties on behalf of the railroad and the railroad does not otherwise qualify those employees of the contractor that are allowed to perform those duties. A contractor that chooses to train its own safety-related railroad employees shall provide each railroad that utilizes it with a document proving or stating that:

(1) The contractor's training program was approved by FRA; or

(2) The contractor is not required to submit the similar training program or plan as required in § 243.103(b) but is maintaining the similar training program or plan, pursuant to other regulatory requirements contained elsewhere in this chapter.

(f) Railroad's responsibility to retain contractor's validation of program: A railroad that chooses to utilize contractor employees to perform safety-related duties and relies on contractor-provided training as the basis for those employees' qualification to perform those duties shall retain a document from the contractor declaring or proving that the contractor's program was approved by FRA, or the contractor is not required to submit the similar training program or plan as required in § 243.103(b) but is maintaining the similar training program or plan, pursuant to other regulatory requirements contained elsewhere in this chapter. A copy of the document required in paragraph (e) of this section satisfies this requirement.

6. Section 243.103 is amended by revising paragraphs (a)(1) and (2)(v), (b), and (d) to read as follows:

**§ 243.103 Training components identified in program.**

(a) \* \* \*

(1) A unique name and identifier for each formal initial and refresher training course of study;

(2) \* \* \*

(v) The anticipated course duration for all formal training combined, excluding the course duration of OJT;

\* \* \* \* \*

(b) An employer that is required to adopt and comply with similar training programs or plans, pursuant to other regulatory requirements contained elsewhere in this chapter, is not required to submit those similar training programs or plans in accordance with this part. When any such similar program or plan, pursuant to other regulatory requirements contained elsewhere in this chapter, includes OJT but does not include the

OJT components specified in paragraph (a)(3) of this section and in § 243.101(d), the employer shall supplement its program to include the OJT components in accordance with this part. Additionally, when any such similar program or plan, pursuant to other regulatory requirements contained elsewhere in this chapter, is amended for any reason, the employer shall amend its program without submission to FRA under § 243.109.

\* \* \* \* \*

(d) FRA may require modifications to any programs, including those programs referenced in paragraph (b) of this section, if it determines essential program components, such as OJT, or arranged practice and feedback, are missing or inadequate. Unless requested by FRA, an employer is not required to submit courseware (i.e., lesson plans, instructor guides, participant guides, job aids, practical exercises, tests/assessments, and other materials used in the delivery of any course) as part of a training program submission.

7. Section 243.105 is amended by removing paragraph (a)(3), revising paragraph (b), and adding paragraph (c) to read as follows:

**§ 243.105 Optional model program development.**

\* \* \* \* \*

(b)(1) An employer that chooses to use a model program approved by FRA is not required to submit the entire program to FRA. Instead, the employer must submit only the unique identifier associated with the program, and all other information that is specific to that employer or deviates from the model program.

(2) An employer that chooses to adopt a model program at FRA's part 243 web portal (<https://safetydata.fra.dot.gov/Part243/>) will be prompted for the required information and find each model program developer's contact information if the developer has an FRA-approved training program.



(3) An employer that chooses to adopt and implement a model program must contact the model program developer and obtain the associated course/training materials necessary for training safety-related railroad employees. FRA does not prohibit a model program developer from charging an employer a fee for the right to use a model training program it developed or requiring each employer obtain its explicit authorization before the employer adopts one of its model programs.

(4) An employer that submits, adopts, and implements an FRA-approved model program, consistent with the operations of that employer, will be considered in compliance with the employer program requirements of § 243.101.

(c) (1) Once a model program is approved by FRA, the developer must consider when it is necessary to make revisions in accordance with § 243.109. A developer that revises its model program is required to provide notice of the FRA-approved changes to its authorized users. A model program developer is required to provide notice of any model program revisions by engaging in any form of communication that positively affirms the developer provided notice to employers likely to be impacted by the changes to the program, including posting the information at the organization's website, writing letters to the employers, and including information in periodic newsletters. Such notice must be at least as effective as the notice the developer provided to employers when it developed the model program. For example, if the developer makes its model program available to anyone with access to the developer's website, then posting a notice of any revisions to the program on its website will be sufficient. In contrast, if a model program developer requires explicit authorization to use its model programs, the developer must provide adequate notice to those entities that it has specifically authorized in a manner consistent with its authorization practices.

(2) Once notified, an employer that is adopting and complying with a model program must:

(i) Adopt and comply with the revisions to the model program made by the developer; or

(ii) Submit information explaining how the employer's training program will deviate from the model program in accordance with § 243.109.

8. Section 243.107 is amended by:

- a. Revising paragraph (a) introductory text and paragraph (a)(4);
- b. Removing paragraphs (a)(5) and (6);
- c. Removing and reserving paragraph (b); and
- d. Removing paragraph (c).

The revisions read as follows:

**§ 243.107 Training program submission, introductory information required.**

(a) An employer who provides training of safety-related railroad employees shall submit its training program to FRA for review and approval. For an employer using FRA's part 243 web portal, the web portal will prompt the employer to provide the required information in this section. Each employer shall state in its submission whether, at the time of filing, it:

\* \* \* \* \*

(4) Uses any combination of paragraphs (a)(1) through (3) of this section.

(b) [Reserved]

\* \* \* \* \*

9. Section 243.109 is amended by revising the section heading, the introductory heading in paragraph (a), and paragraph (a)(2) to read as follows:

**§ 243.109 Initial and refresher training program submission, review, and approval process.**

(a) *Initial and refresher programs.*

\* \* \* \* \*

(2) An employer's initial program, as required by § 243.101(a) or (b), or an employer's refresher program, as required by § 243.201(e), must be submitted to the Associate Administrator and is considered approved and may be implemented immediately upon submission. Following submission, the Associate Administrator will review the program and inform the employer as to whether the program conforms to this part. If the Associate Administrator determines that all or part of the program does not conform, the Associate Administrator will inform the employer of the specific deficiencies. The deficient portions of the non-conforming program may remain in effect until approval of the revised program, unless FRA provides notification otherwise. An employer shall resubmit the portion of its program, as revised to address specific deficiencies, within 90 days after the date of any notice of deficiencies from the Associate Administrator. A failure to resubmit the program with the necessary revisions shall be considered a failure to implement a program under this part. The Associate Administrator may extend this 90-day period upon written request.

\* \* \* \* \*

10. Section 243.111 is amended by revising paragraphs (a), (c)(3), and (e), and removing paragraphs (c)(5) through (7) to read as follows:

**§ 243.111 Approval of programs filed by training organizations or learning institutions.**

(a) A training organization or learning institution that provides training services for safety-related railroad employees, including providing such training services to independent students who enroll with such training organization or learning institution and who will rely on the training services provided to qualify to become safety-related railroad employees, must submit its program to FRA for review and approval unless:

(1) The program is approved as a model program under § 243.105 or an employer program under § 243.101; and

(2) The training organization or learning institution submits an informational filing to its previously approved program containing the information required in paragraph (c) of this section.

\* \* \* \* \*

(c) \* \* \*

(3) The training organization or learning institution's primary telephone number and point of contact; and

\* \* \* \* \*

(e) Previously approved programs require an informational filing when modified. The training organization or learning institution shall review its previously approved training program and modify it accordingly when new safety-related Federal railroad laws, regulations, or orders are issued, or new safety-related technologies, procedures, or equipment are introduced into the workplace and result in new knowledge requirements, safety-related tasks, or in modifications of existing safety-related duties. A training organization or learning institution that modifies its training program for these described reasons shall submit an informational filing to the Associate Administrator not later than 30 days after the end of the calendar year in which the modification occurred, unless FRA advises otherwise. Programs modified in accordance with this paragraph are considered approved upon modification and may be implemented immediately. Any program deficiencies noted by the Associate Administrator shall be addressed as specified in this section. A training organization or learning institution may transfer an approved program to another training organization or learning institution, or an employer, and that transfer will require the acquiring entity to file an informational filing unless the acquiring entity is making substantial additions or revisions to the previously approved program, which will require FRA review under paragraph (f) of this section. The filing shall contain a summary description of sufficient detail so that FRA can associate the

changes with the training organization's or learning institution's previously approved program, and shall include:

\* \* \* \* \*

11. Section 243.113 is revised to read as follows:

**§ 243.113 Electronic and written program submission requirements.**

(a) Each employer, training organization, or learning institution to which this part applies is required to file by electronic means at FRA's part 243 web portal any program submissions required under this part in accordance with the requirements of this section. FRA's part 243 web portal will prompt users to submit all required training program information. Each organization, business, or association that develops an optional model program in accordance with § 243.105 is required to file by electronic means at FRA's part 243 web portal the program in accordance with the requirements of this section.

(b) Before any person's first program submission electronically at FRA's part 243 web portal, the person must register for access at the portal, <https://safetydata.fra.dot.gov/Part243/>. Users must provide the following information to complete registration:

(1) The name of the employer, organization, learning institution, business, or association;

(2) The names of two individuals, including job titles, who will be the person's points of contact and will be the only individuals allowed access to FRA's secure document submission site;

(3) The mailing addresses for the person's points of contact;

(4) The person's system or main headquarters address located in the United States;

(5) The email addresses for the person's points of contact; and

(6) The daytime telephone numbers for the person's points of contact.

(c) A person that electronically submits an initial program, informational filing, or new portions or revisions to an approved program required by this part at FRA's part 243 web portal shall be considered to have provided their consent for FRA to electronically store any materials required by this part and to receive approval or disapproval notices from FRA by email.

### **Subpart C—Program Implementation and Oversight Requirements**

12. Section 243.201 is amended by revising paragraphs (a), (b), (c)(2), (d) introductory text and (d)(1), and (e)(1) and (2), and adding paragraphs (e)(3) and (f) to read as follows:

#### **§ 243.201 Employee qualification requirements.**

(a)(1) Each employer must permit only employees appropriately trained and qualified to perform safety-related service.

(2) In addition to any required knowledge-based training, an employer may limit a safety-related railroad employee's training to only the relevant Federal requirements that apply to the safety-related tasks that the employer authorizes the employee to perform.

(3) Each employer conducting operations subject to this part shall either:

(i) Declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory, and only permit designated employees to perform safety-related service in that occupational category or subcategory; or

(ii) For an employer that does not designate employees by occupational category or subcategory, retain a record for each employee identifying the list of Federal railroad safety laws, regulations, and orders that cover the work the person is designated as qualified to perform.

(b) An employer commencing operations shall declare the designation of each of its existing safety-related railroad employees by occupational category or subcategory before beginning operations, and only permit designated employees to perform safety-related service in that category or subcategory. Any person designated shall have met the requirements for newly hired employees or those assigned new safety-related duties in accordance with paragraph (c) of this section.

(c) \* \* \*

(2) If the training curriculum includes OJT, the employee shall demonstrate, to the satisfaction of a designated instructor, OJT proficiency by successfully completing the safety-related tasks necessary to become a qualified member of the occupational category or subcategory. However, as part of the OJT process and before completing any of the formal training, including classroom training and OJT, and passing the field evaluation, a person may perform such tasks under the direct onsite observation of any qualified person, provided the qualified person has been advised of the circumstances and is capable of intervening if an unsafe act or non-compliance with Federal railroad safety laws, regulations, or orders is observed. An employee designated to provide formal training to other employees, and who is not a designated instructor, shall be qualified on the safety-related topics or tasks in accordance with the employer's training program and the requirements of this part.

(d) Employees previously trained or qualified, but not by the current employer: If an employee has received relevant training or qualification for a particular occupational category or subcategory through participation in a FRA-required training program completed by an entity other than the employee's current employer, that training shall satisfy the requirements of this part:

(1) Provided that:

(i) A current record of training is obtained from that other entity; or

(ii) When a current record of training is unavailable from that other entity, an employer performs testing to ensure the employee has the knowledge necessary to be a member of that category or subcategory of safety-related railroad employee. Testing shall include an oral or written examination, as well as the ability to inspect, identify, and initiate corrective action necessary for compliance with Federal railroad safety laws, regulations, or orders, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, or orders. A designated instructor must make the final determination as to whether the employee has the knowledge, skills, and abilities to become a member of an occupational category; and

\* \* \* \* \*

(e) \* \* \*

(1) Beginning January 1, 2022, each Class I railroad, and each intercity or commuter passenger railroad conducting operations subject to this part with 400,000 total employee work hours annually or more, shall deliver refresher training at an interval not to exceed three calendar years from the date of an employee's last training event, except where refresher training is specifically required more frequently in accordance with this chapter. If the last training event occurs before FRA's approval of the employer's training program, the employer shall provide refresher training either within three calendar years from that prior training event or no later than December 31, 2024.

(2) Beginning May 1, 2023, each employer conducting operations subject to this part not covered by paragraph (e)(1) of this section shall deliver refresher training at an interval not to exceed three calendar years from the date of an employee's last training event, except where refresher training is specifically required more frequently in accordance with this chapter. If the last training event occurs before FRA's approval of the employer's training program, the employer shall provide refresher training either



within three calendar years from that prior training event or no later than December 31, 2025.

(3) Each employer shall ensure that, as part of each employee's refresher training:

(i) An employee is advised of changes to any rule, practice, or procedure relevant to the employee's assigned duties;

(ii) An employee must not be allowed to test out of refresher training; and

(iii) The employee is trained and qualified on the application of any Federal railroad safety laws, regulations, and orders the person is required to comply with, as well as any relevant railroad rules and procedures promulgated to implement those Federal railroad safety laws, regulations, and orders. An employer must consider developing refresher training to address railroad-wide or industry-wide safety concerns, or those safety concerns that address an individual employee's weaknesses. To ensure an employee is trained and qualified, rather than repeating initial training, an employer is permitted to consider refresher training as a limited and carefully tailored review of:

(A) All the required steps of a complicated safety-related task;

(B) Existing rules or procedures that were initially learned but rarely used; and

(C) Safety-related tasks that address skill gaps that the employer identified in the workforce through efficiency testing, periodic oversight, annual reviews, accident/incident data, FRA inspection data, or other performance measuring metrics.

(f) An employer must consider ways to provide remedial training and retesting of any employee who fails to successfully pass any training or testing. Under this part, a failure of any test or training does not bar the person from successfully completing the training or testing at a later date.

13. Section 243.203 is amended by revising paragraphs (b)(2) and (6), and (c) to read as follows:

**§ 243.203      Records.**

\*       \*       \*       \*       \*

(b)       \*       \*       \*

(2)       Occupational category or subcategory designations, or other suitable designations, for which the employee is deemed qualified;

\*       \*       \*       \*       \*

(6)       The employee's OJT performance, which shall include the unique name or identifier of the OJT program component in accordance with § 243.103, the date the OJT program component was successfully completed, and the identification of the designated instructor(s) determining that the employee successfully completed all OJT training necessary to be considered qualified to perform the safety-related tasks identified with the occupational categories or subcategories, or other suitable terminology, for which the employee is designated in accordance with the program required by this part;

\*       \*       \*       \*       \*

(c)       *Record accessibility for other than individual employee records.* Except for records demonstrating the qualification status of each safety-related railroad employee as described in paragraph (b) of this section or otherwise specified in this part, each annual review required by this part shall be accessible for three calendar years after the end of the calendar year to which the annual review relates, and each test, inspection, or other event record required by this part shall be accessible for one calendar year after the end of the calendar year to which the event relates. Each employer shall make these records accessible at one headquarters location within the United States, including, but not limited to, a railroad's system headquarters, a holding company's headquarters, a joint venture's headquarters, a contractor's principal place of business or other headquarters located where the contractor is incorporated. This requirement does not

prohibit an employer with divisions from also maintaining any of these records at any division headquarters.

\* \* \* \*

14. Section 243.205 is amended by revising paragraphs (a), (c) introductory text, (d), (e)(1), (g) introductory text, (h), and (i) to read as follows:

**§ 243.205 Periodic oversight.**

(a) *General.* As part of the program required in accordance with this part, an employer shall adopt and comply with a program to conduct periodic oversight tests or inspections to determine if safety-related railroad employees comply with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety. The program of periodic oversight shall commence on the day the employer files its program with FRA pursuant to § 243.101(a) or on the day the employer commences operations pursuant to § 243.101(b). The data gathered through the testing or inspection components of the program shall be used to determine whether systemic performance gaps exist, and to determine if modifications to the training component of the program are appropriate to close those gaps.

\* \* \* \*

(c) *Railroad oversight.* Each railroad shall identify supervisory employees, by category or subcategory, responsible for conducting periodic oversight tests or inspections for the safety-related railroad employees that it authorizes to perform safety-related duties on its property, except a railroad is not required to:

\* \* \* \*

(d) *Operational test exception for a railroad.* A railroad is not required to perform operational tests or inspections of safety-related railroad employees employed by a contractor.

(e) \* \* \*

(1) When oversight test or inspection sessions are scheduled specifically to determine if safety-related employees are in compliance with Federal railroad safety laws, regulations, and orders particular to FRA-regulated personal and work group safety; or

\* \* \* \* \*

(g) *Contractor oversight.* Each contractor shall conduct periodic oversight tests or inspections of its safety-related railroad employees provided:

\* \* \* \* \*

(h) *Oversight divided by agreement.* (1) Notwithstanding the requirements of paragraphs (c) and (g) of this section, a railroad and a contractor may agree that the contractor will provide the oversight by specifying in the program that the railroad has trained the contractor employees responsible for training and oversight; or

(2) Notwithstanding the requirements of this section that assign specific periodic oversight responsibilities to a railroad or a contractor, a railroad and a contractor may agree to a different periodic oversight responsibility arrangement.

(i) *Detailed records required.* Each employer that conducts periodic oversight in accordance with this section must keep a record of the date, time, place, and result of each test or inspection. The records shall specify each person administering tests or inspections, and each person tested. The record shall also provide a method to record whether the employee complied with the monitored duties, and any interventions used to remediate non-compliance. Modifications of the program required by § 217.9 of this chapter may be used in lieu of this oversight program, provided a railroad specifies it has done so in its program submitted in accordance with this part.

\* \* \* \* \*

Issued in Washington, DC under the authority set forth in 49 CFR 1.89(b).

**Amitabha Bose,**

*Administrator.*

[FR Doc. 2022-21277 Filed: 9/30/2022 8:45 am; Publication Date: 10/3/2022]